

CHAPTER 3

LEGAL FRAMEWORK OF THE LAW OF WAR

References

1. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, T.I.A.S. 3362. (GWS)
2. Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members at Sea, August 12, 1949, T.I.A.S. 3363. (GWS Sea)
3. Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, T.I.A.S. 3364. (GPW)
4. Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, August 12, 1949 T.I.A.S. 3365. (GC)
5. The 1977 Protocols Additional to the Geneva Conventions, December 12, 1977, *reprinted in* 16 I.L.M. 1391, DEP'T OF ARMY, PAMPHLET 27-1-1 (GP I & II).
6. Commentary on the Geneva Conventions (Pictet ed. 1960).
7. DEP'T OF ARMY, PAMPHLET 27-1, TREATIES GOVERNING LAND WARFARE (7 December 1956).
8. DEP'T OF ARMY, PAMPHLET 27-1-1, PROTOCOLS TO THE GENEVA CONVENTIONS of 12 August 1949 (1 September 1979).
9. DEP'T OF ARMY, PAMPHLET 27-161-2, INTERNATIONAL LAW, VOLUME II (23 October 1962).
10. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (18 July 1956).
11. NAVAL WARFARE PUBLICATION 1-14/MCWP 5-2.1/COMDTPUB 5800.7 THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (October 1995).[(FORMERLY NWP 9/FMFM 1-10 (REVISION A)]
12. AIR FORCE PAMPHLET 110-31, INTERNATIONAL LAW - THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS (19 November 1976).
13. Morris Greenspan, THE MODERN LAW OF LAND WARFARE (1959).
14. Dietrich Schindler & Jiri Toman, THE LAW OF ARMED CONFLICT (1988).
15. Hilaire McCoubrey, INTERNATIONAL HUMANITARIAN LAW (1990).
16. Howard S. Levie, THE CODE OF INTERNATIONAL ARMED CONFLICT (1986).

I. OBJECTIVES.

- A. Become familiar with the primary sources of the law of war.
- B. Become familiar with the “language” of the law.
- C. Understand how the law of war is “triggered.”
- D. Become familiar with the role of the 1977 Protocols to the Geneva Conventions of 1949.

E. Be able to distinguish “humanitarian” law from human rights law.

II. THE LANGUAGE OF THE LAW. THE FIRST STEP IN UNDERSTANDING THE LAW OF WAR IS TO UNDERSTAND THE “LANGUAGE” OF THE LAW. THIS REFERS TO UNDERSTANDING SEVERAL KEY TERMS AND CONCEPTS THAT ARE WOVEN THROUGH THIS BODY OF LAW.

A. Sources of Law.

1. Customary International Law. This can be best understood as the “unwritten” rules that bind **all** members of the community of nations. Many principles of the law of war fall into this category of international law.
2. Conventional International Law. This term refers to codified rules binding on nations based on express consent. The term “treaty” best captures this concept, **although other terms are used to refer to these: Convention, Protocol, and Annexed Regulations.**
 - a. Norms of customary international law can either be codified by subsequent treaties, or emerge out of new rules created in treaties.
 - b. Many law of war principles are both reflected in treaties and considered customary international law. **The significance is that once a principle attains the status of customary international law, it is binding on all nations, not just treaty signatories.**

B. The “Big Three.” While there are numerous law of war treaties in force today, the three that provide the vast majority of regulation are: the **Hague Convention of 1907 (and Annexed Regulations), the Four Geneva Conventions of 1949, and the 1977 Protocols to the 1949 Geneva Conventions.**

1. **The Targeting Method.** This prong of the law of war is focused on regulating the **methods and means** of warfare, *i.e.* tactics, weapons, and targeting decisions.
 - a. This method is exemplified by the Hague law, consisting of the various Hague Conventions of 1899 as revised in 1907, plus the 1954 Hague Cultural Property Convention and the 1980 Conventional Weapons Convention.

2. **The Protect and Respect Method.** This prong of the law of war is focused on establishing non-derogable protections for the “victims of war.”
 - a. This method is exemplified by the 4 Geneva Conventions of 1949. Each of these four “treaties” is devoted to protecting a specific category of war victims:
 - (1)GW: Wounded and Sick in the Field.
 - (2)GWS: Wounded, Sick, and shipwrecked at Sea.
 - (3)GP: Prisoners of War.
 - (4)GC: Civilians.
 - b. The Geneva Conventions entered into force on 21 October 1950. The President transmitted the Conventions to the United States Senate on 26 April 1951. The United States Senate gave its advice and consent to the Geneva Conventions on 2 August 1955.
3. The “Intersection.” In 1977, two treaties were created to “supplement” the 1949 Geneva Conventions. These treaties are called the 1977 Protocols (I & II).
 - a. While the purpose of these “treaties” was to supplement the Geneva Conventions, they in fact represent a mix of both the Respect and Protect method, and the Targeting method.
 - b. Unlike The Hague and Geneva Conventions, the U.S. has never ratified either of these Protocols.

C. Key Terms.

1. Part, Section, Article . . . Treaties, like any other “legislation,” are broken into sub-parts. In most cases, the **Article** represents the specific substantive provision.
2. “Common Article.” This is a critical term used in the law of war. It refers to a finite number of articles that **are identical in all four of the 1949 Geneva Conventions**. Normally these relate to the scope of application and parties obligations under the treaties. Some of the Common Articles are identically numbered, while others are worded virtually the same, but numbered differently in various conventions. For example, the article dealing with

special agreements is article 6 of the first three conventions, but article 7 of the Fourth Convention.

3. Treaty Commentaries. These are works by official recorders to the drafting conventions for these major law of war treaties (Jean Pictet for the 1949 Geneva Conventions). These “Commentaries” provide critical explanations of many treaty provisions, and are therefore similar to “legislative history” in the domestic context.

D. Army Publications. There are three primary Army sources that reflect the rules that flow from “the big three:”

1. FM 27-10: The Law of Land Warfare. This is the “MCM” for the law of war. It is organized functionally based on issues, and incorporates rules from multiple sources.
2. DA Pam 27-1. This is a verbatim reprint of The Hague and Geneva Conventions.
3. DA Pam 27-1-1. This is a verbatim reprint of the 1977 Protocols to the Geneva Conventions.

III. HOW THE LAW OF WAR IS TRIGGERED.

A. The Barrier of Sovereignty. Whenever international law operates to regulate the conduct of a state, it must “pierce” the shield of sovereignty.

1. Normally, the concept of sovereignty protects a state from “outside interference with internal affairs.” This is exemplified by the predominant role of domestic law in internal affairs.
2. However, in some circumstances, international law “pierces the shield of sovereignty,” and displaces domestic law from its exclusive control over issues. The law of war is therefore applicable **only after the requirements for piercing the shield of sovereignty have been satisfied.**
3. The law of war is a body of international law intended to dictate the conduct of state actors (combatants) during periods of conflict.
 - a. Once triggered, it therefore intrudes upon the sovereignty of the regulated state.

- b. The extent of this “intrusion” will be contingent upon the nature of the conflict.
- B. The Triggering Mechanism. The law of war includes a standard for when it becomes applicable. This standard is reflected in the Four Geneva Conventions.
1. Common Article 2 -- International Armed Conflict: “[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. “
 - a. This is a true *de facto* standard. The subjective intent of the belligerents is irrelevant. According to the Commentary, the law of war applies to: **“any difference arising between two States and leading to the intervention of armed forces.”**
 - b. Article 2 effectively requires that the law be applied broadly and automatically from the inception of the conflict.¹ The following two facts result in application of **the entire body of the law of war:**
 - (1) A dispute **between states, and**
 - (2) **Armed conflict** (see FM 27-10, paras. 8 & 9).
 - (a) *De facto* hostilities are what are required. The drafters deliberately avoided the legalistic term war in favor of the broader principle of armed conflict. According to Pictet, this article was intended to be broadly defined in order to expand the reach of the Conventions to as many conflicts as possible.
 - c. Exception to the “state” requirement: Conflict between a state and a rebel movement recognized as belligerency.
 - (1) Concept arose as the result of the need to apply the Laws of War to situations in which rebel forces had the *de facto* ability to wage war.
 - (2) Traditional Requirements:

¹ HOWARD S. LEVIE, THE CODE OF INTERNATIONAL ARMED CONFLICT 11 (1986). See also Richard R. Baxter, *The Duties of Combatants and the Conduct of Hostilities (Law of the Hague)*, in INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW 97 (1988).

- (a) Widespread hostilities - civil war.
 - (b) Rebels have control of territory and population.
 - (c) Rebels have *de facto* government.
 - (d) Rebel military operations are conducted under responsible authority and observe the Law of War.
 - (e) Recognition by the parent state or another nation.
- (3) Recognition of a belligerent triggers the application of the Law of War, including The Hague and Geneva Conventions. The practice of belligerent recognition is in decline in this century. Since 1945, full diplomatic recognition is generally extended either at the beginning of the struggle or after the belligerency is successful (e.g., the 1997 recognition of Mr. Kabila in Zaire).
- d. Controversial expansion of Article 2 -- Protocol I Additional (1977).
- (1) Expands Geneva Conventions' application to conflicts previously considered exclusively internal: "[A]rmed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self determination." Art 1(4), GPI.
 - (2) U.S. has not yet ratified this convention because of objections to article 1(4) and other articles. The draft of Protocol I submitted by the International Committee of the Red Cross to the 1974 Diplomatic Conference did not include the expansive application provisions.
- e. Termination of Application (Article 5, GWS and GPW; Article 6, GC).
- (1) Final repatriation (GWS, GPW).
 - (2) General close of military operations (GC).
 - (3) Occupation (GC) -- The GC applies for one year after the general close of military operations. In situations where the Occupying Power still exercises governmental functions, however, that Power is bound to apply for the duration of the occupation certain key provisions of the GC.

2. **The Conflict Classification Prong of Common Article 3** -- Conflicts which are not of an international character: “Armed conflict not of an international character occurring in the territory of one of the High Contracting Parties . . .”
- a. These types of conflicts make up the vast bulk of the ongoing conflicts.
 - b. Providing for the interjection of international regulation into a purely internal conflict was considered a monumental achievement for international law in 1949. **But, the internal nature of these conflicts explains the limited scope of international regulation.**
 - (1) Domestic law still applies - guerrillas do not receive immunity for their war-like acts, as they would if such actions were committed during an international armed conflict.
 - (2) Lack of effect on legal status of the parties. This is an essential clause without which there would be no provisions applicable to internal armed conflicts within the Conventions. Despite the clear language, states have been reluctant to apply Article 3 protections explicitly for fear of conferring a degree of international legitimacy on rebels.
 - c. What is an “internal armed conflict?” Although no objective set of criteria exist for determining the existence of a non-international armed conflict, Pictet lists several suggested criteria:
 - (1) The rebel group has an organized military force under responsible command, operates within a determinate territory, and has the means to respect the Geneva Conventions.
 - (2) The legal Government is obliged to have recourse to the regular military forces against the rebels, who are organized and in control of a portion of the national territory.
 - d. Protocol II, which was intended to supplement the substantive provisions of Common Article 3, formalized the criteria for the application of that convention to a non-international armed conflict.
 - (1) Under responsible command.

- (2) Exercising control over a part of a nation so as to enable them to carry out sustained and concerted military operations and to implement the requirements of Protocol II.

C. What is the Relationship with Human Rights?

1. Human Rights Law refers to a totally distinct body of international law, intended to protect individuals from the arbitrary or cruel treatment of governments **at all times**.
2. While the **substance** of human rights protections may be synonymous with certain law of war protections, **it is critical to remember these are two distinct bodies of international law. The law of war is triggered by conflict. No such trigger is required for human rights law.**
 - a. These two bodies of international law are easily confused, especially because of the use of the term “humanitarian law” to describe certain portions of the law of war.

D. How do the Protocols fit in?

1. As indicated, the 1977 Protocols to the Geneva Conventions of 1949 are supplementary treaties. Protocol I is intended to supplement the law of war related to international armed conflict, while Protocol II is intended to supplement the law of war related to internal armed conflict. Therefore:
 - a. When you think of the law related to international armed conflict, also think of Protocol I;
 - b. When you think of the law related to internal armed conflict, also think of Protocol II.
2. Although the U.S. has never ratified either of these Protocols, their relevance continues to grow based on several factors:
 - a. The U.S. has stated it considers many provisions of Protocol I, and all of Protocol II, to be binding customary international law.
 - b. The argument that the entire body of Protocol I has attained the status of customary international law continues to gain strength.
 - c. These treaties bind virtually all of our coalition partners.

- d. U.S. policy is to comply with Protocol I and Protocol II whenever feasible.

IV. OTHER KEY LAW OF WAR CONCEPTS.

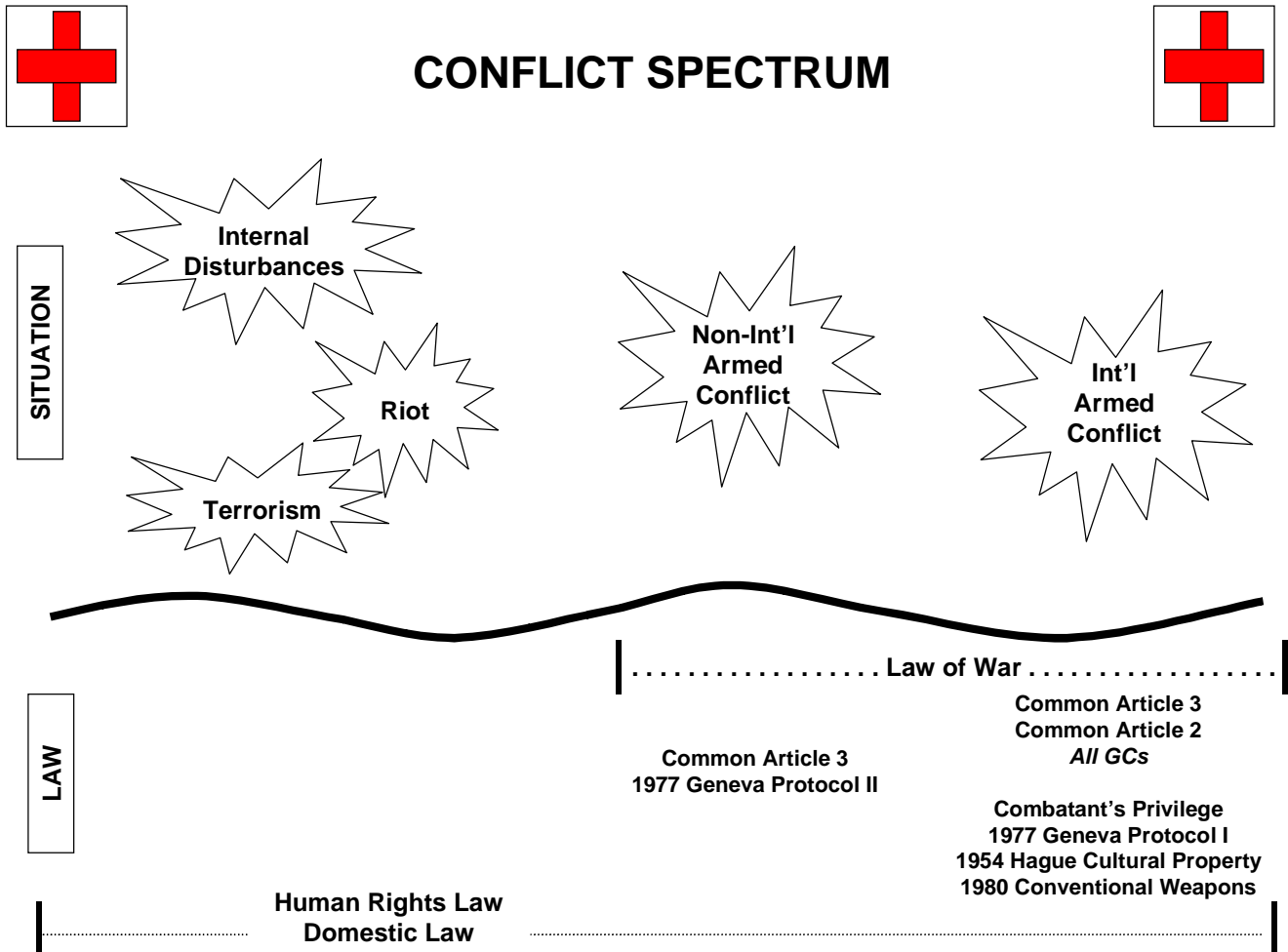
- A. Protected Person. This is a legal “term of art” under the law of war. It refers to an individual vested with the maximum benefit under a given Geneva Convention. Each Convention defines which individuals fall within this category.
- B. Protecting Power. This refers to an agreed upon neutral state responsible for monitoring compliance with the Geneva Conventions and Protocols. Such agreements are rarely reached.
- C. Combatant Immunity. Perhaps the greatest benefit granted to combatants by the law of war, it refers to the immunity afforded by international law for warlike acts committed during international armed conflict. There are two critical caveats:
 - 1. This immunity is not “absolute.” It extends only to acts that are consistent with the law of war. Therefore, a combatant who violates the law of war receives no immunity for that conduct.
 - 2. Combatant Immunity applies **only to international armed conflict**. The inability of international law to extend combatant immunity into internal armed conflicts is perhaps the greatest manifestation of the limited scope of law of war regulation during internal conflicts.
- D. Reprisal. “[A]cts of retaliation in the form of conduct which would otherwise be unlawful, resorted to by one belligerent against enemy personnel or property for acts of warfare committed by the other belligerent in violation of the law of war, for the purpose of enforcing future compliance with the recognized rules of civilized warfare.” [Para. 497, FM 27-10]
 - 1. The concept of reprisal is considered the one true “self-help” mechanism built into the law of war.
 - 2. The right of reprisal has been severely restricted by Protocol I. This was a major motivation behind the U.S. decision not to ratify this treaty.
- E. War Crime. While war “legalizes” many acts that would be unlawful in peacetime, it does not “legalize” everything unlawful in peacetime. War is not a

license to kill, but a limited authorization to kill. War crimes are simply those acts that are unlawful in peacetime, and remain unlawful in wartime.

- F. **Special Agreements.** These are agreements the parties conclude during actual hostilities. The drafters of the Conventions recognized that they could not envision every circumstance that would arise regarding POWs, wounded and sick, and civilians. Thus, they sanctioned the use of special agreements.
- G. **Grave Breaches of the Geneva Conventions:** violations of the law of war involving any of the following acts, if committed against persons or property **protected by the Conventions:** willful killing, torture or inhumane treatment, including biological experiments; willfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; compelling a POW or protected civilian to serve in the armed force of a hostile power; depriving a POW or protected civilian of the rights of fair or regular trial as prescribed in the Conventions; unlawful deportation or transfer or unlawful confinement of a protected civilian; taking hostages.
- H. **Respect for the Conventions (Common Article 1).** Establishment of the basic obligation of signatories of the Geneva Conventions to implement the provisions. The term “respect” was intended to emphasize the humanitarian and unilateral nature of the obligation undertaken by Parties to the Conventions to comply with its provisions.
 - 1. The drafters intended “ensure respect for” to advise the Parties of their continuing obligation to oversee the effective implementation of the Conventions. The term has also been interpreted in the Commentary to include an obligation on the Parties to see that other Parties are complying with the Conventions.²

² In May 1983, the ICRC appealed to the Parties to the Geneva Conventions to bring influence to bear on both Iran and Iraq to better comply with the Law of War during their ongoing conflict. GEOFFREY BEST, LAW AND WAR SINCE 1945 146 (1994).

APPENDIX A



APPENDIX B



Department of Defense DIRECTIVE

NUMBER 5100.77

December 9, 1998

GC, DoD

SUBJECT: DoD Law of War Program

References: (a) DoD Directive 5100.77, "DoD Law of War Program," July 10, 1979 (hereby canceled)
(b) DoD Directive 2310.1, "DoD Program for Enemy Prisoners of War (EPOW) and other Detainees (Short Title: DoD Enemy POW Detainee Program)," August 18, 1994
(c) DoD Directive 5000.1, "Defense Acquisition," March 15, 1996
(d) Hague Convention No. IV, "Respecting the Laws and Customs of War on Land," October 18, 1907
(e) through (l), see enclosure 1

1. REISSUANCE AND PURPOSE

This Directive:

1.1. Reissues reference (a) to update policy and responsibilities in the Department of Defense for a program to ensure DoD compliance with the law of war obligations of the United States.

1.2. Expands the responsibilities of the Secretary of the Army as the DoD Executive Agent for the investigation and reporting of reportable incidents.

1.3. Establishes the DoD Law of War Working Group.

2. APPLICABILITY AND SCOPE

2.1. This Directive applies to the Office of the Secretary of Defense, the Military Departments, the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Defense Agencies, and the DoD Field Activities (hereafter referred to collectively as "the DoD Components").

2.2. In implementation of this Directive, reference (b) addresses the DoD program for care and treatment of enemy prisoners of war (EPW), retained persons, and detainees. A reportable incident

(as defined in subsection 3.2., below) involving possible, suspected, or alleged violations of the protections afforded EPWs, retained persons, or detainees is included in the scope of this Directive.

2.3. In further implementation of this Directive, that part of the law of war relating to legal reviews of the development, acquisition, and procurement of weapons and weapon systems for the DoD Components is addressed in DoD Directive 5000.1 (reference (c)) and in related guidance pertaining to Special Access Programs.

3. DEFINITIONS

3.1. Law of War. That part of international law that regulates the conduct of armed hostilities. It is often called the law of armed conflict. The law of war encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.

3.2. Reportable Incident. A possible, suspected, or alleged violation of the law of war.

4. POLICY

It is DoD policy to ensure that:

4.1. The law of war obligations of the United States are observed and enforced by the DoD Components.

4.2. An effective program to prevent violations of the law of war is implemented by the DoD Components.

4.3. All reportable incidents committed by or against U.S. or enemy persons are promptly reported, thoroughly investigated, and, where appropriate, remedied by corrective action.

4.4. All reportable incidents committed by or against allied persons, or by or against other persons during a conflict to which the U.S. is not a party, are reported through command channels for ultimate transmission to appropriate U.S. Agencies, allied governments, or other appropriate authorities. Once it has been determined that U.S. persons are not involved in a reportable incident, an additional U.S. investigation shall be continued only at the direction of the appropriate Combatant Commander. On-scene commanders shall ensure that measures are taken to preserve evidence of reportable incidents pending turnover to U.S., allied, or other appropriate authorities.

5. RESPONSIBILITIES

5.1. The General Counsel of the Department of Defense shall:

5.1.1. Provide overall legal guidance in the Department of Defense on the Law of War Program, to include review of policies developed under or relating to the program, coordination of special legislative proposals and other legal matters with other Federal Departments and Agencies, and resolution of disagreements on questions of law.

5.1.2. Establish a DoD Law of War Working Group consisting of representatives from the General Counsel of the Department of Defense (GC, DoD), the Legal Counsel to the Chairman of the Joint Chiefs of Staff, the International and Operational Law Division of the Office of the Judge Advocate General of each Military Department, and the Operational Law Branch of the Office of the Staff Judge Advocate to the Commandant of the Marine Corps. The DoD Law of War Working Group shall develop and coordinate law of war initiatives and issues, manage other law of war matters as they arise, and provide advice to the General Counsel on legal matters covered by this Directive.

5.1.3. Coordinate and monitor the Military Departments' plans and policies for training and education in the law of war.

5.2. The Under Secretary of Defense for Policy shall:

5.2.1. Exercise primary staff responsibility for the DoD Law of War Program.

5.2.2. Ensure that the Assistant Secretary of Defense (International Security Affairs) shall provide overall development, coordination, approval, and promulgation of major DoD policies and plans, including final coordination of such proposed policies and plans with DoD Components and other Federal Departments and Agencies as necessary, and final coordination of DoD positions on international negotiations on the law of war and U.S. signature or ratification of law of war treaties.

5.3. The Heads of the DoD Components shall:

5.3.1. Ensure that the members of their Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations.

5.3.2. Institute and implement effective programs to prevent violations of the law of war, including law of war training and dissemination, as required by references (d) through (h).

5.3.3. Ensure that qualified legal advisers are immediately available at all levels of command to provide advice about law of war compliance during planning and execution of exercises and operations; and institute and implement programs to comply with the reporting requirements established in section 6., below.

5.4. The Assistant Secretary of Defense for Public Affairs shall monitor the public affairs aspects of the DoD Law of War Program and provide public affairs guidance, as appropriate, to the DoD Components.

5.5. The Secretaries of the Military Departments shall develop internal policies and procedures consistent with this Directive in support of the DoD Law of War Program to:

5.5.1. Provide directives, publications, instructions, and training so that the principles and rules of the law of war will be known to members of their respective Departments, the extent of such knowledge to be commensurate with each individual's duties and responsibilities.

5.5.2. Ensure that programs are implemented in their respective Military Departments to prevent violations of the law of war, emphasizing any types of violations that have been reported under this Directive.

5.5.3. Provide for the prompt reporting and investigation of reportable incidents committed by or against members of their respective Military Departments, or persons accompanying them, in accordance with directives issued under paragraph 5.8.4., below.

5.5.4. Where appropriate, provide for disposition, under the Uniform Code of Military Justice (reference (i)), of cases involving alleged violations of the law of war by members of their respective Military Departments who are subject to court-martial jurisdiction.

5.5.5. Provide for the central collection of reports and investigations of reportable incidents alleged to have been committed by or against members of their respective Military Departments, or persons accompanying them.

5.5.6. Ensure that all reports of reportable incidents are forwarded to the Secretary of the Army in his or her capacity as the DoD Executive Agent under subsection 5.6., below.

5.6. The Secretary of the Army, as the Executive Agent for the Secretary of Defense for reportable incidents, shall act for the Secretary of Defense in developing and coordinating plans and policies for, and in supervising the execution of, the investigation of reportable incidents and, subject to DoD 8910.1-M (reference (j)), the collection, recording, and reporting of information concerning reportable incidents. This authority is separate from and subject to the responsibilities assigned the Combatant Commanders in subsections 4.4., above, and 5.8., below, and the responsibilities assigned the Secretaries of the Military Departments in subsection 5.5., above.

5.7. The Chairman of the Joint Chiefs of Staff shall:

5.7.1. Provide appropriate guidance to the Commanders of the Combatant Commands, consistent with 10 U.S.C. 163 (a)(2) (reference (k)), conforming with the policies and procedures in this Directive. This guidance will include direction on the collection and investigation of reports of enemy violations of the law of war.

5.7.2. Designate a primary point of contact in his organization to administer activities under this Directive.

5.7.3. Issue and review appropriate plans, policies, directives, and rules of engagement, as necessary, ensuring their consistency with the law of war obligations of the United States.

5.7.4. Ensure that plans, policies, directives, and rules of engagement issued by the Commanders of the Combatant Commands are consistent with this Directive and the law of war.

5.8. The Commanders of the Combatant Commands shall:

5.8.1. Institute effective programs within their respective commands to prevent violations of the law of war and ensure that their commands' plans, policies, directives, and rules of engagement are subject to periodic review and evaluation, particularly in light of any violations reported.

5.8.2. Implement guidance from the Chairman of the Joint Chiefs of Staff for the collection and investigation of reports of enemy violations of the law of war.

5.8.3. Designate the command legal adviser to supervise the administration of those aspects of this program dealing with possible, suspected, or alleged enemy violations of the law of war.

5.8.4. Issue directives to ensure that reportable incidents involving U.S. or enemy persons are reported promptly to appropriate authorities, are thoroughly investigated, and the results of such investigations are promptly forwarded to the applicable Military Department or other appropriate authorities.

5.8.5. Determine the extent and manner in which a reportable incident not involving U.S. or enemy persons will be investigated by U.S. forces and ensure that such incidents are reported promptly to appropriate U.S. Agencies, allied governments, or other appropriate authorities.

5.8.6. Ensure all plans, policies, directives, and rules of engagement issued by the command and its subordinate commands and components are reviewed by legal advisers to ensure their consistency with this Directive and the law of war.

5.8.7. Ensure that law of war training and dissemination programs of subordinate commands and components are consistent with this Directive and the law of war obligations of the United States.

5.9. The Assistant Secretary of Defense for Command, Control, Communications and Intelligence shall ensure that the Director, Defense Intelligence Agency, shall provide information from the intelligence community to the Secretary of the Army and to the Commanders of the Combatant Commands, consistent with their respective obligations under subsections 5.6. and 5.8., above, concerning reportable incidents perpetrated against captured or detained U.S. persons, or committed by or against U.S. allies, or committed by or against other persons during a conflict to which the United States is not a party.

6. INFORMATION REQUIREMENTS

6.1. Reports of Incidents. All military and civilian personnel assigned to or accompanying a DoD Component shall report reportable incidents through their chain of command. Such reports also may also be made through other channels, such as the military police, a judge advocate, or an Inspector General. Reports that are made to officials other than those specified in this subsection shall, nonetheless, be accepted and immediately forwarded through the recipient's chain of command.

6.2. Initial Report. The commander of any unit that obtains information about a reportable incident shall immediately report the incident through command channels to higher authority. The initial report shall be made through the most expeditious means available.

6.3. Higher authorities receiving an initial report shall:

6.3.1. Request a formal investigation by the cognizant military investigation authority.

6.3.2. Submit a report of any reportable incident, by the most expeditious means available, through command channels, to the responsible Combatant Commander. Normally, an OPREP-3

report, established in Joint Pub 1-03.6, Joint Reporting System, Event/Incident Reports (E/IR), will be required. Copies of the E/IR shall be provided to the DoD Component officials designated by the Heads of the DoD Components concerned.

6.3.3. Submit a report, in accordance with DoD Instruction 5240.4 (reference (l)), concerning any criminal case, regardless of the allegation, that has received, is expected to receive, or which, if disclosed, could reasonably be expected to receive, significant media interest.

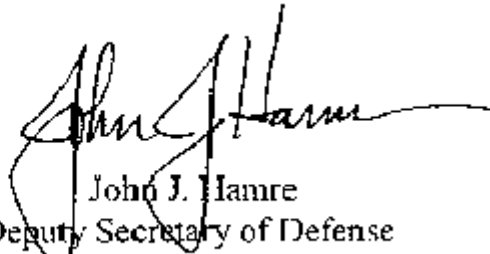
6.4. The Combatant Commander shall report, by the most expeditious means available, all reportable incidents to the Chairman of the Joint Chiefs of Staff, the Secretary of Defense, and the Secretary of the Army in his role as the Executive Agent under subsection 5.6., above.

6.5. DoD Notifications. Notifications of a reportable incident shall be forwarded to the Chairman of the Joint Chiefs of Staff; the GC, DoD; the Assistant Secretary of Defense for Public Affairs; and the Inspector General of the Department of Defense, who will inform their counterparts in any Military Service or Department concerned.

6.6. Information Requirements. The Event/Incident Reports referred to in this Directive and further described in reference (l) are exempt from licensing in accordance with paragraph 5.4.2. of DoD 8910.1-M (reference (j)).

7. EFFECTIVE DATE AND IMPLEMENTATION

This Directive is effective immediately. Forward two copies of implementing documents to the General Counsel of the Department of Defense and the Under Secretary of Defense for Policy within 120 days.



John J. Hamre
Deputy Secretary of Defense

Enclosures - 1

E1. References, continued

E1. ENCLOSURE 1

REFERENCES, continued

- (e) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949
- (f) Geneva Convention for Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, August 12, 1949
- (g) Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949
- (h) Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949
- (i) Sections 801-940 of title 10, United States Code, “Uniform Code of Military Justice”
- (j) DoD 8910.1-M, “DoD Procedures for Management of Information Requirements,” June 1998, authorized by DoD Directive 8910.1, June 11, 1993
- (k) Section 163(a)(2) of title 10, United States Code
- (l) DoD Instruction 5240.4, “Reporting of Counterintelligence and Criminal Violations,” September 22, 1992

APPENDIX C



CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION

J-5
DISTRIBUTION: A, B, C, J, S

CJCSI 5810.01A
27 August 1999

IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM

References:

- a. DOD Directive 5100.1, 25 September 1987, "Functions of the Department of Defense and Its Major Components"
- b. DOD Directive 5100.77, 9 December 1998, "DOD Law of War Program"
- c. CJCS Manual 3150.03, 19 June 1998, "Joint Reporting Structure Event and Incident Reports"

1. Purpose. Pursuant to the authorities delegated in references a and b, this instruction establishes joint policy, assigns responsibilities, and provides guidance regarding the law of war obligations of the United States. Reference a assigns the Chairman of the Joint Chiefs of Staff the responsibility to develop and establish military doctrine and guidance for all aspects of the joint employment and activities of the Armed Forces. Reference b provides policy guidance and assigns responsibility within the Department of Defense for a program to ensure compliance with the law of war. This instruction implements the requirements of reference b to provide common policy for coordinated actions by the Military Services and combatant commands.

2. Cancellation. CJCSI 5810.01, 12 August 1996, is canceled.

3. Applicability. This instruction applies to all personnel of the Armed Forces, including civilians, regardless of assignment or attachment.

4. Definitions.

a. Law of War. That part of international law that regulates the conduct of armed hostilities; often called the law of armed conflict. The law of war encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.

- b. Reportable Incident. A possible, suspected, or alleged violation of the law of war.

5. Policy

a. The Armed Forces of the United States will comply with the law of war during all armed conflicts; however, such conflicts are characterized and, unless otherwise directed by competent authorities, will comply with the principles and spirit of the law of war during all other operations. Specifically, reference b provides that it is the policy of the Department of Defense to ensure that:

(1) The law of war obligations of the US Government are observed and enforced by the US Armed Forces.

(2) An effective program designed to prevent violations of the law of war is implemented by the US Armed Forces.

(3) All reportable incidents committed by or against members of, or persons serving with or accompanying, the US Armed Forces are promptly reported, thoroughly investigated, and, where appropriate, remedied by corrective action.

(4) All known reportable incidents committed by or against allied military or civilian personnel, or by or against other persons during a conflict to which the United States is not a party, are reported through appropriate command channels for ultimate transmission to appropriate US agencies, allied governments, or other appropriate authorities. See subparagraph 6c(6)(d).

b. Legal advisers will, at all appropriate levels of command during all stages of operational planning and execution of joint and combined operations, provide advice concerning law of war compliance. Advice on law of war compliance will address not only legal constraints on operations but also legal rights to employ force.

6. Responsibilities

- a. The Director, Joint Staff (DJS) will:

(1) Ensure that the Joint Staff acts on policy, politico-military, and other issues involved in the execution of the DOD Law of War Program and provides necessary liaison with the Office of the Secretary of Defense, the Department of State, the Services, and the combatant commands.

(2) Ensure that Joint Staff directorates provide policy and operational guidance within their respective functional areas as noted below:

(a) The Director for Manpower and Personnel (J-1) will ensure that a copy of all investigations of reportable incidents, submitted by the combatant commanders in accordance with subparagraphs 6c(6)(b)-(d), is forwarded to appropriate Joint Staff principals (DJS/J-2/J-3/J-5/LC/ PA).

(b) The Director for Intelligence (J-2) will establish priority intelligence requirements (PIR) for all law of war violations alleged to have been committed against captured or detained US persons, committed by or against US allies, or committed by or against other persons during a conflict to which the United States is not a party. The PIR will be listed as part of Appendix 1 to Annex B (Intelligence) to all operation plans.

(c) The Director for Operations (J-3) will, in coordination with the Legal Counsel to the Chairman:

1. Ensure that the Joint Operations Planning and Execution System includes appropriate guidance to ensure review of plans and rules of engagement for compliance with the law of war.

2. Review all requests from the combatant commanders for deployment orders and rules of engagement to ensure conformity with this instruction and the DOD Law of War Program, as well as domestic and international law.

(d) The Director for Strategic Plans and Policy (J-5) will:

1. Serve as the Joint Staff principal point of contact for the DOD Law of War Program and, in coordination with the Legal Counsel to the Chairman, provide necessary liaison for developing policy within the context of the DOD Law of War Program.

2. Ensure that the Joint Strategic Capabilities Plan includes appropriate guidance to ensure compliance with the law of war.

(e) The Director for Operational Plans and Interoperability (J-7) will, in coordination with the Legal Counsel to the Chairman:

1. Review operation plans and strategic concepts issued by commanders of combatant commands to ensure conformance with domestic and international law, this instruction, and the DOD Law of War Program.

2. Ensure that operational exercises include law of war scenarios or interest items to improve evaluation, response, and reporting procedures.

(f) The Legal Counsel to the Chairman (LC) will:

1. Provide overall legal guidance to the Chairman of the Joint Chiefs of Staff on the DOD Law of War Program.

2. Review all plans, policies, directives, deployment orders, execute orders, and rules of engagement issued by the Joint Staff and/or submitted by combatant commanders to ensure their conformance with domestic and international law, this instruction, and the law of war.

3. Provide a representative to the DOD Law of War Working Group established by the DOD General Counsel pursuant to reference b.

b. The Combat Support Agencies will establish and periodically review agency-unique policies, directives, and training programs consistent with this instruction and the DOD Law of War Program to ensure that the requirements of the law of war are disseminated throughout their respective organizations.

c. The Commanders of Combatant Commands are responsible for the overall execution of the DOD Law of War Program within their respective commands. Specific responsibilities include ensuring:

(1) That an effective program is instituted within the command to prevent law of war violations.

(2) That all plans, policies, directives, and training programs are periodically reviewed for compliance with the law of war, particularly in light of any violations reported.

(3) That specific law of war scenarios or interest items are included in exercises to improve evaluation, response, and reporting procedures.

(4) That command legal advisers attend planning and operations-related conferences for military operations and exercises, as appropriate, to enable them to provide advice concerning law of war compliance during joint and combined operations.

(5) That all operation plans (including preplanned and adaptively planned strategic targets), concept plans, rules of engagement, execute orders, deployment orders, policies, and directives are reviewed by the command legal adviser to ensure compliance with domestic and inter-national law, this instruction, and the DOD Law of War Program. (6) That all appropriate policies, directives, and operation and concept plans incorporate the reporting and investigation requirements established by reference b and this instruction, and by the Secretary of the Army, who is designated by reference b as the DOD Executive Agent for the administration of the DOD Law of War Program with respect to the investigation and reporting of reportable incidents. Specifically, commanders of combatant commands will:

(a) Designate the command legal adviser to supervise the administration of the command's program for dealing with reportable incidents.

(b) Ensure, via appropriate command directives, that all reportable incidents committed by or against members of, or persons serving with or accompanying, US Armed Forces are reported promptly to appropriate authorities, are thoroughly investigated, and the results of such investigations are promptly forwarded to the applicable Military Department or other appropriate authorities. Applicable directives will include specific guidance on the collection and preservation of evidence of reportable incidents committed by enemy forces against US personnel, since such evidence may serve as the basis for a possible future trial of accused war criminals.

(c) Provide the Joint Staff/J-1 with copies of all incident reports and reports of investigation of reportable incidents committed by or against members of, or persons accompanying or serving with, US Armed Forces, or against their property. The Joint Staff/J-1

will ensure that such reports are provided to appropriate Joint Staff principals (DJS/J-2/J-3/J-5/LC/PA).

(d) Determine, with respect to known reportable incidents committed by or against allied military or civilian personnel, or by or against other persons during a conflict to which the United States is not a party, the extent and manner in which such incidents will be investigated by US forces. Specifically, combatant commanders will develop appropriate plans, policies, and directives for:

1. Conducting appropriate preliminary investigation to determine whether US personnel were involved. Once it has been determined that US personnel are not involved in a reportable incident, additional US investigation will only be conducted at the direction of the appropriate combatant commander.

2. Cooperating with appropriate allied authorities.

3. Reporting through appropriate command channels to appropriate US agencies, allied governments, or other appropriate authorities.

4. Preserving evidence of reportable incidents pending turnover to other US agencies, allied governments, or other appropriate authorities.

(7) That mobilization planning includes sufficient numbers of legal advisers and investigative personnel to support each commander's mission.

(8) That the law of war training and dissemination programs within their commands, as well as the law of war training and dissemination programs of their subordinate commands and components, are consistent with reference b, this instruction, and the law of war obligations of the United States.

7. Reporting Requirements.

a. Reports of Incidents. Commanders of combatant commands will issue directives to ensure that all military and civilian personnel assigned to or accompanying US Armed Forces will report all reportable incidents through their chain of command. The directives will indicate that such reports may also be made through other channels, such as the military police, a judge advocate, or an Inspector General. The directives will require that reports made to officials other than those specified in this paragraph will, nonetheless, be accepted and immediately forwarded through the recipient's chain of command.

b. Initial Report. Law of war implementing directives issued by combatant commanders will require the commander of any unit that obtains information about a reportable incident to immediately report the incident through command channels to a higher authority. The report will be made through the most expeditious means available.

c. Formal Investigation. Commanders of combatant commands will establish procedures for receiving initial reports of reportable incidents, and will ensure that their subordinate commanders:

(1) Submit a report, by the most expeditious means available, through command channels to the responsible combatant commander. Normally, an OPREP-3 report will be required in accordance with reference c.

(2) Initiate a formal investigation by an appropriate military investigative authority in accordance with subparagraphs 6c(6)(b) and 6c(6)(d) above. d. The responsible combatant commander will submit a message report, as expeditiously as possible, to the Joint Staff (JOINT STAFF WASHINGTON DC//DJS/J-1/J-2/J-3/J-5/LC/PA//) of all reportable incidents. The Office of the Secretary of Defense (SECDEF WASHINGTON DC//USDP/ISA/GC/IG/PA//) and the Secretary of the Army (DA WASHINGTON DC//SAGC/SAIG/DAMO-ZA/DAJA//), in his capacity as Executive Agent under paragraph 5.6 of reference b, will also be addressees on such message reports.

8. Summary of Changes. This instruction reissues the canceled CJCSI 5810.01 and provides updated guidance in accordance with reference b.

9. Releasability. This instruction is approved for public release; distribution is unlimited. DOD components (to include the combatant commands), other Federal agencies, and the public may obtain copies of this instruction through the Internet from the CJCS Directives Home Page--<http://www.dtic.mil/doctrine>. Copies are also available through the Government Printing Office or the Joint Electronic Library CD-ROM.

10. Effective Date. This instruction is effective immediately. Forward copies of implementing directives or supplements and revisions to the Joint Staff, J-5 Global Division, Room 2E1001, Pentagon, Washington, D.C. 20318-5154, within 120 days of receipt of this instruction. The Chief, J-5 Global Division, will forward copies of such documents to the Office of the Secretary of Defense in accordance with reference b.

/Signature/

HENRY H. SHELTON

Chairman

of the Joint Chiefs of Staff